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January 30, 2004

Secretary Bryant L. Van Brakle
Federal Maritime Commission
800 North Capitol Street, N.W. Room 1046
Washington, D.C. 20573

Re: FMC Petition Docket Nos. P3-03, P7-03, P8-03 and P9-03; Reply Comments of NCBFAA

Dear Bryant:

As discussed, I have enclosed 20 copies of a red-line version and 5 more copies of the original clean version of our Comments.

If you have any questions concerning this, please do not hesitate to contact me. We apologize for the confusion and inconvenience that this has caused.

Very truly yours,

Edward D. Greenberg

EDG
Encl

CC:020/030

ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS
FMC Petition No. P3-03

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. FOR A LIMITED EXEMPTION FROM CERTAIN TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984
FMC Petition No. P5-03

PETITION OF OCEAN WORLD LINES, INC. FOR A RULEMAKING TO AMEND AND EXPAND THE DEFINITION AND SCOPE OF "SPECIAL CONTRACT" TO INCLUDE ALL OCEAN TRANSPORTATION INTERMEDIARIES
FMC Petition No. P7-03

PETITION OF BAX GLOBAL INC. FOR RULEMAKING
FMC Petition No. PS-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF CONFIDENTIAL SERVICE CONTRACTS
FMC Petition No. P9-03

REPLY COMMENTS
of
THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

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RED-LINED VERSION

In accordance with the Commission's notice served November 13, 2003, the National Customs Brokers and Forwarders Association of American, Inc. ("NCBFAA") submits this reply to the comments filed by various parties with respect to the NCBFAA's petition for a limited exemption from certain tariff requirements it filed in this docket and to the petitions filed by the NVOCC petitioners in Docket Nos. P3-03, P7-03, P8-03 and P9-03.[1]

I. INTRODUCTION

The issue of the NVOCC tariff tiling or publication has been contentious for many years. Indeed, even within the NVOCC industry, there was at one time a strongly held divergence of opinion as to whether NVOCC rate tariffs served a useful purpose or whether, instead, they were an anachronistic throwback to the days of a tightly regulated shipping industry. Such disagreements are a thing of the past, however, as is vividly demonstrated by the 5 petitions tiled by the NCBFAA and the NVOCC petitioners.

While these parties approach the issue somewhat differently, all agree that there is now an urgent need for the Commission to recognize how the entire ocean shipping industry has evolved, to use its authority to eliminate burdensome and expensive barriers to the provision of efficient NVOCC services and permit NVOCCs to serve their customers efficiently and competitively. The uncontroverted evidence in this record demonstrates that tariffs no longer serve the purpose for which they were intended, namely, to act as a standardized pricelist, that was open to review and comparison by shippers and carriers alike, that was applied equally to all shippers and that provided a relatively stable array of rate offerings for shippers and carriers in

[1] These petitioners are respectively, United Parcel Service, Inc. ("UPS"), Ocean World Lines, Inc. ("OWL"), BAX Global Inc. ("SAX") and C.H. Robinson Worldwide, Inc. ("Robinson").

the ocean shipping industry. The enactment of the Ocean Shipping Reform Act of 1998 ("OSRA") has clearly changed that.

Now, ocean shipping has been transformed from common to contract carriage, where rates and services are negotiated individually by NVOCCs and their customers, where comprehensive logistics and other value-added services routinely play a significant role in satisfying the needs of the shipping public and where the memorialization of ocean rates in tariff form has become a formalistic exercise without value to anyone. Consequently, the NVOCCs, together with the shippers they serve, are united on the need to move away from the rate tariff publication structure that today exists only as a make-work function for the few companies that act as tariff publishing agents.

The need for relief is amply demonstrated by the hundreds of comments that have been submitted to the Commission on this topic. With but few exceptions, every party filing comments has vigorously supported the elimination of mandatory rate tariff publication, as suggested by the NCBFAA, or supported authorizing NVOCCs to enter into confidential service contracts with their shipper customers, as suggested by UPS, BAX or Robinson. Although NVOCCs have historically been reticent to provide the Commission with public statements on any topic, even when their livelihood is being threatened by the malpractices of other parties, over 60 NVOCCs have come forward to supply evidence concerning the urgent need for change and the significant and unnecessary cost burdens imposed by the status quo. Approximately 200 members of Congress have registered their separate views that the post-OSRA market place has changed faster than Congress anticipated and that the Commission can and should exercise its authority and expertise to fashion relief in this area.

A number of significant trade associations representing intermediaries have filed detailed, extensive and authoritative comments in these proceedings, all of which uniformly support the need for the Commission to utilize its authority under Section 16 of the Act to grant the relief sought by these petitions. Those organizations include the Transportation Intermediary Association ("TIA"), the NVOCC-Government Affairs Conference ("NVO-GAC"), the New York/New Jersey Foreign Freight Forwarders and Brokers Association ("NY/NJ"), the International Container Organization and the American Institute for Shippers' Associations, Inc. ("AISA"). In addition, the United States Department of Justice ("DOJ") and the United States Department of Transportation ("DOT") have tiled comments supporting the elimination of unnecessary regulatory barriers and, in particular, the exemptions of NVOCCs from rate tariff publication.

In several tilings, the National Industrial Transportation League ("NITL") has expressed the views of its shipper members that rate tariffs no longer serve a useful public purpose and impede the efficient functioning of the ocean-shipping marketplace. In that regard, NITL endorsed a set of Common Principles that were intended to guide the Commission in its deliberations on these issues. Together with the NCBFAA and the TIA, NITL urged the FMC to recognize that:

- The Commission has the authority under §16 of the 1984 Shipping Act to grant the exemption requested by the NCBFAA.
- The Commission should use its liberalized exemption authority to reduce unnecessary regulatory burdens.
- The elimination of tariff publication burdens would have a competitive impact on the industry.

- The nature of the ocean-shipping marketplace has changed from common carriage to one of contract carriage, so that common carriage tariffs no longer serve a valid purpose.
- The regulatory costs incurred by NVOCCs for rate tariff publication has no relationship to any consumer benefits, since shippers ~~don't~~do not access these tariffs for any purpose.
- While the Commission should also consider permitting NVOCCs to enter into service contracts, that authority should not be restricted to large NVOCCs.
- In addition, the Commission needs to carefully consider whether it would be necessary for NVOCCs to file such service contracts.

(See Joint Additional Comments of the National Industrial Transportation League, National Customs Brokers and Forwarders Association of America, and Transportation Intermediary Association, tiled January12, 2004.)

In its initiating Petition (tiled August 8, 2003) and the comments concerning the petitions filed by the other petitioners in these dockets (tiled October 10, 2003), the NCBFAA explained the nature of the relief it was seeking, the dramatic change in the industry that has taken place since the enactment of OSRA, why relief is necessary, why the Commission has the authority to grant this relief, and why it should be unnecessary for NVOCCs to file such service contracts with the FMC. Rather than burden the Commission with duplicative arguments on these issues, the NCBFAA incorporates that material by reference and requests the Commission to consider those submissions when reviewing the record in this matter. Instead, this pleading is directed at -- and replies to -- the opposing views of the VOCCs, as represented by the submission of the World Shipping Council ("WSC") and American President Limes, Ltd. ("APL"), both of which were filed October10, 2003.

II. THE HISTORICAL PERSPECTIVE MANDATES THIS CHANGE

In its comments (at 8-10), the WSC argues that the Commission previously addressed the tariff exemption issue and that nothing has occurred warranting a different result on this occasion. With all respect, the WSC ignores the very historical perspective it claims to value in its zeal to prolong the needless and wasteful burden that rate tariff publication imposes on NVOCCs. It ***is*** regrettable that the WSC is still unable to get past the attitude that anything helpful to NVOCCs must be bad for VOCCs. Regardless, it is clear that times have changed and that the evidence, Congressional policies and statute now compel relieving NVOCCs of the burden of rate tariff publication.

WSC initially relies on the fact that the petition filed by the International Federation of Freight Forwarders Associations ("FIATA") in 1991, which sought this same relief, failed. The Commission noted clearly, however, in Petition No. P5-91, *Petition for Exemption from the* ***NVOCC Tariff Filing Requirements Under The Shipping Act*** *of* ***1984, 26*** S.R.R. 240, 246, that those petitioners had not met their burden because:

(1) of a lack of probative evidence supporting the petition;

(2) of a lack of consensus within the NVOCC and shipper communities on this issue;

(3) it was not evident how the exemption would prevent NVOCC discrimination against shippers; and

(4) the petitioners had not explained how the relief would not disadvantage VOCCs.

Here, however, the NCBFAA, and the large number of other commenting parties (including NVOCCs, trade associations, shippers and government organizations) have submitted substantial ***evidence*** demonstrating that rate tariffs no longer serve any purpose for shippers, NVOCCs, VOCCs or government agencies. Similarly, ***the*** significant volumes of ***evidence***

demonstrate that rate tariff publication engenders substantial transactional costs for which there is no contravening benefit to any party and that the requested relief would benefit competition and commerce.

This was not the situation in 1992. To. the contrary, the shipping industry has substantially evolved since the enactment of OSRA. As the NCBFAA pointed out in its Petition, the whole structure of the ocean transportation industry has moved from one of common carriage to one of contract carriage. Consequently, all parties -- VOCCs, shippers and NVOCCs -- are negotiating rates and service offerings on an individual basis without resort to any published rate matrix. Today, there is a competitive commercial marketplace in which shippers expect and demand the ability to negotiate individualized rates and services fitting their commercial needs. Hence, the concern expressed in 1992 about NVOCCs discriminating in their dealings with shippers is now a desired goal by the entire shipping community.*

With respect to whether an exemption might lead to discriminatory treatment between NVOCCs and VOCCs, this concern was allayed by the persuasive (and still accurate) views expressed by then FMC Chairman Koch when he said:

> Competition between NVOCC's and vessel operators (VO's), to the extent it exists, differs fundamentally from VO – VO competition. When vessel operators compete, someone wins and carries the cargo and someone loses and doesn't. To the extent VO's and NVO's "compete," the competition is for who issues a shipper a bill of lading and makes a little more money as a result. Even when the NVO wins in that exercise, the VO's aren't total losers because they will -- they must -- still carry the cargo on their ships.

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2 A benefit shippers and VOCCs derive from contracting -- more flexible and customized arrangements that are better suited to their business objectives -- could also be accomplished in comparable contracting arrangements between shippers and NVOCCs. From the perspective of shippers, commerce is facilitated due to the contracting process itself, and not because the party with whom they can contract owns a vessel. Comments of NITL, filed October 10, 2003, at 7.

Statement of Chairman Koch on NVOCC Tariff Filing ("Koch Statement"), 26 S.R.R. 465 (August, 1992).

Similarly, although the Commission subsequently discontinued a separate proceeding (that had inquired into the possibility of increasing pricing flexibility for NVOCCs by using minimum-maximum rates for LCL cargo), its decision on that occasion was again prompted by the clear lack of any industry-wide consensus. Consequently, when the Commissioners split evenly on a motion to discontinue the proceeding, the concurring opinion of Commissioner Hsu prophetically noted that the stalemate was unsatisfactory and might ultimately "disadvantage" the NVOCC industry. FMC Docket ***No. 92-22,*** *Tariff Filing* ***by Non-Vessel-Operating Common Carriers, 26*** S.R.R. 965,966 (June 4, 1993).

Then FMC Chairman Koch was even more prophetic at that time. As far back as 1992, he raised -- and succinctly dispatched -- a number of the objections that are today proffered by the VOCCs in opposition to these petitions. In addition to noting the fact that NVOCCs ultimately cannot discriminate against VOCCs, Chairman Koch observed:

(1) Requiring NVOCCs to file rate tariffs is inconsistent with the practices of the United States' major trading partners and contrary to the principles of the Shipping Act that the "regulatory system should 'insofar as possible' be 'in harmony with and responsive to international shipping practices'."

(2) The Commission is to be mindful of the President's instructions to remove unnecessary regulatory burdens.

(3) NVOCCs lack market power to engage in any action competitive behavior, in part because they do not have anti-trust immunity. Indeed, rate tariff publication inhibits price competition.

(4) Even with strict tariff enforcement, there is price ~~competition~~discrimination in the NVOCC market "and the world has not spun off its axis."

(5) The Commission needs to be mindful of the nightmare of the undercharge crisis that afflicted shippers in the motor carrier industry, due to the fact that many carriers were negotiating rates with their customers without memorializing them in a tariff format.[3]

Consequently, then Chairman Koch expressed his views that the exemptions sought by FIATA satisfied all four criteria of former Section 16 of the Act, noting that

> [s]o long as there is a reasonable basis to believe that the FMC can bring less regulation, increased flexibility and greater competition to the NVOCC marketplace, I believe we should try to do so.

(Koch Statement, 26 S.R.R. at 466-468.)

APL argues, in its comments at 21, that the NCBFAA opposed the FIATA petition in ~~1992 while~~1992. While that is certainly true, that position was taken at a different time, in a completely different environment. In 1992, there was no such thing as confidential contracts. In 1992, despite the presence of service contracts, the shipping industry was governed by rigid principles of nondiscriminatory, common carriage and all transportation rates were open and monitored by shippers and carriers. The enactment of OSRA changed that structure. Hence, the views expressed at that time, while accurate then, have no relevance to today's marketplace.

[3] While this has not yet affected shippers in the maritime industry, there is always a possibility that a large intermediary could become bankrupt, leaving its shippers with the same type of liability that arose in the partially deregulating motor carrier industry. As the NCBFAA pointed out previously, VOCCs have gone bankrupt, leaving shippers with substantial unforeseen costs. (Comments of the NCBFAA to Petitions of UPS, OWL, BAX and Robinson, tiled October 10, 2003, at 10 n.5). If this happened to an NVOCC that had not complied with the letter of the rate tariff publication requirements, the undercharge crisis could well be repeated.

III. THE COMMISSION HAS THE AUTHORITY UNDER SECTION 16 TO EXEMPT NVOCCs FROM THE TARIFF PUBLICATION REQUIREMENTS OF THE SHIPPING ACT

Congress has delegated to the Commission broad authority to grant an exemption from any of the requirements of the Shipping Act so long as the exemption will not result in substantial reduction in competition or be detrimental to commerce. Section 16 of the Shipping Act, as amended by OSRA, provides, in pertinent part:

> The Commission, upon application or on its own motion, may by order or rule exempt for the future ***any*** class of agreements between persons subject to this Act or ***any*** specified activity of those persons from ***any*** requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.

46 U.S.C. App. § 1715 (2003). (Emphasis added.)[4]

NVOCCs are indisputably "persons subject to" the Shipping Act. Moreover, the NCBFAA's Petition seeks an exemption from tariff publication obligations that are clearly a "specified activity" required by the Shipping Act. Thus, the plain language of Section 16 makes clear that the Commission has the authority to exempt NVOCCs from tariff publication requirements of the Shipping Act if doing so will not result in a substantial reduction in competition or be detrimental to commerce.

Although the unambiguous language of Section 16 authorizes the grant of an exemption from ***any*** requirement of the Shipping Act, APL and WSC nonetheless contend that the Commission does not have authority to exempt NVOCCs from the tariff publication requirements of the Shipping Act. APL and WSC advance two primary arguments for limiting

[4] In OSRA, Congress substantially broadened the Commission's authority to grant exemptions to the requirements of the Shipping Act by eliminating two of the four criteria previously required for the grant of a Section 16

the Commission's exemption authority in the face of the broad language of Section 16. First, APL and WSC assert that the Commission's exemption authority under Section 16 does not apply to any statutory requirement -- such as tariff publication by NVOCCs -- that has been specifically addressed by Congress. Second, APL argues that tariff publication is so integral to the regulation of NVOCCs, that removing this obligation would essentially "override" the regulatory scheme for NVOCCs contemplated by Congress and undermine policies fundamental to the Act. Neither argument has merit.

The suggestion that Section 16 does not authorize exemptions for requirements specifically addressed by Congress is completely without support in law or logic. Indeed, the very notion is nonsensical. Every regulatory requirement contained in the Shipping Act is, by definition, an issue specifically addressed by Congress. Similarly, every regulatory requirement contained in the Shipping Act represents a conscious policy determination by Congress. If Section 16 did not apply to statutory requirements or conscious policy determinations specifically addressed by Congress, it would be a nullity. In fact, the essential nature of a Section 16 exemption is to relieve a regulated "person" from a statutory requirement otherwise imposed by Congress.

APL and WSC appear to have forgotten that Section 16 is itself a conscious policy decision by Congress to vest in the Commission discretion to grant exemptions from ***any*** requirement imposed by Congress in the Shipping Act. Thus, APL's assertion that "Section 16 does not vest in the Commission authority to nullify decisions consciously made by Congress as to the coverage of the 1984 Act" is exactly wrong. That is precisely the broad authority

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exemption. The purpose of the amendment of Section 16 was to facilitate the exemption of provisions and practices where further deregulation is warranted. See S. Rep. No. 105-61, 105th Cong., 1st Sess. 30 (July 31, 1997).

Congress delegated to the Commission in Section 16 subject to the specific parameters set forth in Section 16 itself.[5] The exemption from NVOCC tariff publication requirements requested by NCBFAA meets the requirements of Section 16 and should be granted.

Moreover, Congress clearly did not intend to restrict the Commission's Section 16 exemption authority relating to tariff obligations. To the contrary, Congress obviously contemplated that Section 16 exemptions from tariff obligations might be appropriate. OSRA amended Section 10 of the Shipping Act to provide, in pertinent part, that "no common carrier ... may provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a tariff published under Section 8 of this Act unless excepted or ***exempted under Section S(a)(l) or 16 of the Act," 46*** U.S.C. §1709(b)(2)(A) (emphasis added). It is hard to believe that Congress would have inserted a specific reference to Section 16 exemptions relating to tariff obligations if Congress intended that no such exemptions be granted.

APL also argues that tariffs are so integral to the regulation of NVOCCs that granting the requested exemption from tariff publication would improperly "override" the regulatory scheme for NVOCCs envisioned by Congress. In particular, APL asserts that Congress' failure to legislatively remove tariff publication requirements for NVOCCs in OSRA implies a Congressional determination that tariff publication is an essentially sacrosanct element of the regulatory scheme. That very argument was rejected, however, in remarkably similar circumstances in ***Central & Southern Motor Freight*** *Tariff Ass'n v.* ***U.S., 797*** F.2d 301 (1985).

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[5] Similar broad exemption provisions contained in other statutes have been applied under similar circumstances to relieve carriers of tariff tiling obligations following deregulatory legislation that failed to repeal the tariff filing obligations. ***See, e.g., Exemption*** *of* ***Motor*** *Contract* ***Carrier*** *from Tariff* ***Filing Requirements,*** 133 M.C.C. 150 (1983) (contract motor carriers); CAB Order 79-3-51 (March 8, 1979) (indirect air carriers).

In that case, the D.C. Circuit upheld an exemption from tariff filing obligations for motor carriers issued by the ICC shortly after Congress enacted deregulatory amendments to the Motor Carrier Act, even though Congress did not itself remove tariff tiling requirements from the statute. The Court found that Congress' failure to remove tariff filing requirements could not be construed as an affirmative determination that tariffs were not subject to the broad exemption provisions also retained in the statute. See 757 F.2d at 316-317. Instead, the Court found that the elimination of tariff filing by exemption was fully consistent with the broad scope of the exemption provision, as well as changes enacted by Congress to the national transportation policy favoring market forces over regulation. The same analysis applies here.6

APL also argues that the Commission itself has recognized that Section 16 exemption authority cannot be used "to make a fundamental change in the nature of the Congressionally-established regime governing ocean shipping." APL Comments at 24. The Commission decisions cited by APL, however, were all based on the statutory requirement that Section 16 exemptions "not substantially impair effective regulation." ***See, e.g., Motor Vehicle Manufacturers Assn. -- Petition*** *for* ***Exemption,*** 25 S.R.R. 849, 852 (1990) (to grant exemption, the Commission must find, ***inter alia,*** "that the exemption will not substantially impair effective regulation by the Commission"). However, Congress removed the requirement that exemptions not substantially impair effective regulation in OSRA as part of its broader efforts to deregulate the ocean shipping industry. See 46 U.S.C. App. Section 1701(4) (2003) (Congressional policy "to promote the growth and development of United States exports through competitive and efficient ocean transportation by placing a greater reliance on the marketplace"). As a result,

6 In the *Motor Freight* case, as in the present circumstances, the legislative history of the statute at issue indicated that Congress intended that the agency effect additional deregulatory changes beyond those contained in the statute. See 757 F.2d at 317; S. Rep. No. 105-61, 105th Cong., 1st Sess. 30 (July 31, 1997).

OSRA both broadened the Commission's exemption authority and also indicated Congress' desire to move away from a tariff-based regulatory scheme and place greater reliance on market forces. The elimination of tariff publication for NVOCCs is consistent with the deregulatory policies underlying OSRA, and accordingly, would not effect a fundamental change in the regulatory scheme contemplated by Congress.

IV. THE EXEMPTION WILL NOT REMOVE NVOCCS FROM COMMISSION OVERSIGHT

The WSC argues that relief requested by the NCBFAA is too sweeping, in that the Commission "would have no routine access to rate data for NVOCCs and that an exemption from §10(b)(1) of the Act would encourage "circumvention of carrier rates by false billing, false classification, false ~~swaying~~weighing, etc." Similarly, WSC suggests that NVOCCs would no longer be prohibited from engaging in unfair or unjust discriminatory practices.

Simply stated, WSC is incorrect. In the first place, the NCBFAA seeks only to have NVOCCs exempted from the obligation to memorialize the rates they negotiate with shippers in tariff format. Consequently, if the exemption is granted, the negotiated rate would become the lawful rate just as it is today (as long as that negotiated rate is published). As such, the prohibition in Section 10(b)(1) -- which prohibits devices intended to disguise inappropriate reduced charges -- would not be relevant to the commercial relationship between NVOCCs and their customer. However, as the NCBFAA has not sought an exemption from the provision of Section 10(a)(1) of the Act, NVOCCs would not be free to engage in those malpractices with respect to the VOCCs.

Insofar as discrimination is concerned, the policy underlying the exemption is the recognition that the entire industry has moved away from common carriage and that rates are

individually negotiated with customers; hence, the common carriage concept of one price for everyone no longer has meaning. This point is eloquently brought home by the dozens of verified statements tiled by NVOCCs and shippers alike in this proceeding. Moreover, and as then Chairman Koch pointed out, without anti-trust immunity, NVOCCs are unable to engage in discriminatory practices against either their customers or the VOCCs. And, in any event, the NCBFAA has not requested that the Commission exempt NVOCCs from the provisions ~~on~~of Section 10(d)(1) of the Act; hence, the Commission would remain free to redress any unjust or unreasonable practices in which NVOCCs might potentially engage.

Similarly, the exemption would not remove NVOCCs from Commission oversight of their commercial relationships. Unlike VOCCs, NVOCCs in the U.S. are bonded and licensed. And, one of the conditions of that license is that they make their rates available for inspection and review on demand by representatives of the Commission (46 C.F.R. §515.31(g)). Similarly, while foreign domiciled NVOCCs are not licensed, they are still bonded. The Commission would therefore still have a remedy against any foreign domiciled NVOCCs that refuse to make the records available to Commission investigators or otherwise cooperate in a Commission investigation. The potential suspension of an entity's ability to operate in the U.S. trade is generally sufficient to eliminate any circumvention of the Commission's scrutiny.' Hence, the absence of published rate tariffs clearly would not hamper the Commission's oversight of NVOCC "commercial relationships with their customers."

WSC claims that the exemption somehow disturbs the balance between the rights and responsibilities of being a carrier, in that NVOCCs have the ability to limit their liability under

[7] By way of example: although VOCCs are neither licensed nor bonded, that has not hampered the Commission's exercise of its responsibility in implementing its obligations under §19 of the Merchant Marine Act, 1920 or the Foreign Shipping Practices Act of 1988.

COGSA, to retain their "shipper" status in their dealings with VOCCs, theyand have the ability to place liens on cargo. These statutory privileges are somehow "tied" to being common carriers and granting an exemption from the common carrier obligation to publish rate tariffs allegedly alters the "Act's balance between rights and responsibilities." (WSC comments at 11.)

But, being exempted from publishing rate tariffs does not make an NVOCC any less a carrier than would be a VOCC or NVOCC that handles exempt commodities for which no tariffs need to be established at all. Moreover, it is beyond cavil that not all carriers are treated the same way under the Act, as is evident from the fact that VOCCs: are able to enter into anti-trust immunized agreements; have service contracts with their customers; have special protections under the Foreign Shipping Practices Act, and are attempting to obtain special "opt-out" protection in the international negotiations that are looking to establish a uniform convention to replace COGSA.[8]

APL takes a similar but equally incorrect tack in arguing that rate tariff publication is somehow an essential component of NVOCC functions under the Act. In its comments (at 22-23), APL claims that rate tariff publication is an integral part of NVOCC regulation, as tariff publications "include (a) details of the NVOCC's proof of financial responsibility, (b) the name and address of its agent for service and (c) certain information regarding co-loading." Yet, in the first place, none of these informational issues have any relevance to the rate publication issue under discussion and all can be satisfied in other ways; for. For example, since the FMC's website now has details concerning the location of NVOCC and VOCC tariff websites, it could easily add the name of sureties and contact information for process agents. Second, the claimed need for some unspecified information concerning an NVOCC's co-loading practices is simply

mystifying. And, of course, the NCBFAA has specifically suggested only a limited exemption concerning the publication of rate tariffs; rules tariffs -- which contain each of the items that appear to concern APL -- would still be published.

APL goes on to express concern that granting the petitions would somehow eliminate the FMC "as a convenient forum to adjudicate disputes with NVOCCs", citing three cases that have been adjudicated over the last ten years. (APL comments, at 23.) It is not clear, however, why the Commission would necessarily be removed as a potential forum, since the NVOCC would still be obliged to adhere to the applicable rate that had been negotiated with its customer; the only thing that has changed is that the rate would no longer be published in an electronic tariff format. Moreover, shippers are often required to litigate disputes in forums other than the relevant regulatory agencies. After all, rail, truck and air shippers are not able generally to seek redress of overcharge disputes at the Surface Transportation Board or the Department of Transportation. And, ocean shippers are frequently required to arbitrate their disputes with VOCCs in inconvenient foreign arbitration tribunals or courts due to boiler-plate provisions in their adhesion form service contracts.

V. THERE IS ABUNDANT FACTUAL SUPPORT FOR THE SOUGHT EXEMPTION

Unlike the situation in 1992, these dockets have been deluged with statements submitted by over 60 intermediaries, each of whom provided a detailed statement covering the rate negotiation process, the burdens and costs imposed by rate tariff publication, the inefficiencies and problems inherent in such an antiquated system and the fact that these rate tariffs simply no longer serve any useful purpose.

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[8] See NCBFAA Comments, filed October 10, 2003, at 7 and Appendix A.

For example, the statement submitted by Quast & Co., Inc. indicates that it was a pioneer in the NVOCC industry and has been engaged as such since the early 1970s. Quast points out that: none of its customers ever access its electronic tariffs; rates are negotiated "on a customer-by-customer and sometimes on a shipment-by-shipment basis;" and the cost of publishing these rates "in many cases, exceeds the profit derived for a shipment."

J.W. Allen notes that it was hesitant to take the time necessary to speak out on this issue, but reconsidered when "reminded that all of the money we spent on tariff filing is wasteful, as the rates, once filed are never referenced or used again." Although J.W. Allen estimated that its costs for doing so were relatively small, given the volume of its NVOCC activity, it concluded that this expense "for a small company is a lot."

DJS International Services, Inc. estimated that rates were separately negotiated with its customer approximately 90% of the time and concluded its statement by noting:

> Shippers do not want to look into a tariff to find a rate. Shippers as a whole have a habit to call us and try to negotiate rates for shipments that they have moving. Once their rate is established and filed then that is the rate in which their cargo moves unless there are market changes that force a new rate and tariff tiling. As a result of not having to maintain a tariff this would reduce our operating expenses, which in turn would enable us to not have to pass on these associated costs to our client.

The Camelot Company notes that during the past 3 year period, it had not received a single "hit" on its electronic tariff. Instead, rates are negotiated on a company-by-company basis in which "shippers are making phone calls and sending e-mail rather than consulting published, public outlets."

Barthco Logistics, Inc. notes that they "normally negotiate pricing directly with . . . customers to cover specific shipments and specific commercial situations at the time of

shipment. The filing of those rates in [its] tariff then becomes an administrative, but up to this point, necessary burden to ensure . compliance." Although it annually expends approximately $20,000, again a substantial amount for a small NVOCC, "the tariffs are never looked at by those they are intending to protect, the shipping community."

A.N. Deringer, Inc. observes that the substantial costs it absorbs are wasted because no one accesses their tariffs. In addition, most of the rates it establishes are in spot markets, in which rates are separately negotiated on numerous occasions. Additionally, Deringer complains about the rigidity of the tariff structure, in which NVOCCs are unable to pass along rate increases imposed by VOCCs during the 30-day window as another example of the problems inherent in the existing system.

Econocaribe Consolidators, Inc. notes that the only party that has accessed its tariff in the past has been the FMC. In its words, "not one of our 10,000 active clients has requested access to our tariff during the past 3 years." Consequently, while tariffs served a useful purpose prior to OSRA, Econocaribe has concluded that tariff rates "are no longer useful to the shipping public."

After detailing the cost burden of rate tariff publication, C.H. Power Company discusses the problem of requiring NVOCCs to abide by rigid rate tariff rules while steamship lines are able to change rates at will through contract provisions. In addition, despite the substantial costs it has incurred publishing tariffs, not a single inquiry from a shipper has been received pertaining to its tariff rates.

Kuehne & Nagel, Inc., which is the agent for the world's largest NVOCC, notes that the publication of freight rates is rarely useful, even if anyone did access them on a tariff website. Instead, its customers are typically interested in the total transportation and service package cost, not the relatively small aspect that pertains to the NVOCC ocean freight portion of those

services. And, with respect to negotiation of rates with its customers, Kuehne & Nagel indicates that its customers do not "monitor or review the rates filed" in its tariff but instead rely on quotations or detailed Requests for Quotations and web-based auctions for their ocean services. Consequently, since no shipper has ever accessed their tariff rates, Kuehne & Nagel has concluded that its maintenance expenses, which exceed $100,000 annually, are not justifiable.

Evidence of this nature is submitted by, again, over 60 NVOCCs. Some of this evidentiary supports consist of relatively brief statements, while others -- including the evidence submitted by UPS, BAX, Robinson and OWL -- all speak to several common themes. First, the cost of tariff publication is an unnecessary expense, since no one ever accesses these tariffs. Second, rates are almost uniformly separately negotiated with each customer, so that the publication process only serves to memorialize the nature of the agreement, rather than to provide guidance to that specific shipper or other members of the public. Third, the need to publish rate tariffs is inefficient and makes it far more difficult for NVOCCs to provide efficient service at the lowest possible cost to the shipping public. It is accordingly clear that the record in this proceeding establishes that there is no commercial or regulatory value to requiring the publication of NVOCC rate tariffs.

Additional strong evidence of the need for the requested relief is contained in the comments filed by the DOJ and the DOT. Among other things, the DOJ notes: that the Commission does have the authority, under Section 16, to issue the exemption from rate tariff publication; ~~agrees that~~ the current requirements increase NVOCC costs without providing any value to shippers; that tariff publication provides no consumer benefits; and that the NCBFAA's proposal is strongly pro-competitive. Although we have not yet seen the submission of DOT that is to be tiled in this proceeding, DOT supported FIATA's 1991 exemption petition on the

grounds that tariff filing can impede innovation by hampering an NVOCC's ability to respond to rapidly changing conditions and by imposing unnecessary costs. DOT also argued that this burden falls disproportionately on the NVOCC community because they often tend to be small businesses. *Petition for* ***Exemption, 26*** S.R.R. at 245 n. 9. While the NCBFAA expects DOT to be equally supportive on this occasion, the views it expressed at that time provide considerable additional support for issuance of the exemption.

VI. THE EVIDENCE DOES SATISFY THE STATUTORY EXEMPTION CRITERIA

In its initial Petition in this proceeding, the NCBFAA explained why granting the exemption would satisfy the Section 16 criteria of neither resulting in a "substantial reduction in competition" or "be detrimental to commerce." (NCBFAA Petition, at 13-15.) As to the first point, WSC makes the unusual argument that granting this relief "would place NVOCCs in a preferred regulatory position." (WSC Comments, at 13.) Precisely how NVOCCs are favored is not made clear, especially since the VOCCs have anti-trust immunity, are already able to enter into ocean service contracts, have attempted to carve out a favorable position for themselves with respect to the international convention that may replace and are otherwise treated specially and given special protection under the Foreign Shipping Practices Act and Section 19 of the Merchant Marine Act, 1920.

Regardless, and as noted by then Chairman Koch over 10 years ago, an exemption of this nature would not result in a substantial reduction in competition but instead "would produce just the opposite -- it would produce more effective competition because the market would not be impeded or restrained by the artificial restriction of a filed tariff." Koch Statement, 26 S.R.R. at 468.

With respect to the second statutory criteria under \$16, WSC does not even make an attempt to allege, let alone establish, that the requested exemption would somehow be detrimental to commerce. Regardless, the increased commercial flexibility that NVOCCs would have in the ocean shipping marketplace could not conceivably be detrimental to commerce; to the contrary, this flexibility can only increase efficiency, reduce costs and facilitate the competitive market that Congress intended when it enacted OSRA. It is therefore not surprising that these exemption petitions have garnered such widespread support from NVOCCs, shippers, trade associations and government agencies.

~~VI~~VII. THE NCBFAA WITHDRAWS ITS REQUEST FOR RANGE RATES REMEDY

In its petition, the NCBFAA indicated that the Commission might alternatively consider a more limited exemption looking toward the establishment of range rates. In its reply comments, both WSC and APL note that they were not categorically opposed to this alternative as a way of reducing the burdensome costs of tariff publication and penalties for minor tariff infractions. And, more recently, NVOCC-GAC and the NY/NJ tiled comments, which urged the issuance of the sought ~~exemptions,~~exemption and endorsed the NCBFAA's range rate alternative and proposed a range rate model.

While the NCBFAA greatly appreciates the interest and support of NVO-GAC and NY/NJ, it has now determined that this alternative is not appropriate and therefore respectfully requests that the Commission not initiate a rulemaking on that subject for a number of reasons. The NCBFAA has spent a great deal of time canvassing its members and relevant committees in an attempt to ascertain whether it is possible to construct a range model that would (1) satisfy the requirements of being sufficiently flexible so as to meaningfully reduce the tariff publication burden, (2) be sufficiently broad so as to permit NVOCCs to participate in the ocean shipping

marketplace without having to constantly publish rate changes, and (3) ~~would~~ **still be** acceptable to the Commission from an oversight perspective. Despite substantial efforts, the NCBFAA has been unable to develop or even suggest a framework for a model, matrix or formula that would accomplish these objectives.

While the NCBFAA has reached out to the WSC in an attempt to see whether the two organizations -- or their members -- could work together in an attempt to provide guidance in this area that would be constructive, those efforts were also ultimately unsuccessful. Despite the fact that it has been over five months since the NCBFAA Petition was filed, the WSC has not given any indication of the nature of any range that it might find acceptable. While the NVO-GAC and NY/NJ obviously gave considerable thought to this issue, the NCBFAA believes that even the 50% range rate model proposed by those organizations is still insufficiently flexible so as to avoid substantial rate publication obligations during the course of the year and will, in any event, likely be too broad to be acceptable to the VOCC community.

Moreover, after considering the various comments that have been tiled in this proceeding, the NCBFAA has become convinced that the FMC does have ample authority to grant the relief requested in its petition. With that in mind, there is no reason to settle for the partial remedy of range rates, particularly when that avenue would only maintain the fiction that meaningful rate tariffs do exists. That is not the case today, and it would not be the case if the range rate alternative was adopted. Instead, this seemingly attractive remedy would threaten to cause confusion, leave unnecessary regulatory burdens in place and delay the time when tariff rate publication will ultimately end.

Consequently, rather than having the parties become bogged down in a lengthy and expensive rulemaking proceeding that would at the end of the day not achieve the major

objectives sought by the NCBFAA, the Association believes it necessary to urge that this alternative not be further pursued by the Commission.

~~VII~~VIII. CONCLUSION

The Commission now has the opportunity to eliminate the costly, unnecessary barriers that have burdened NVOCCs at least since the enactment of OSRA and thereby convey substantial benefits to NVOCCs and shippers alike. There can be no legitimate question concerning the Commission's power in this regard, as Congress specifically liberalized the exemption statute in Section 16 and freed the agency to utilize that authority when appropriate.

The record in this proceeding conclusively demonstrates that no legitimate policy is served any longer by pretending that NVOCCs are providing common carriage when the entire world is well aware that trade exists today in a contract carriage environment. The continuation of rate publication serves only the goals of increasing NVOCC costs, decreasing their efficiency and competitiveness, placing them at some regulatory risk relating to any noncompliance with regulations that no longer have any meaning, and capitulating to a VOCC industry that often and wrongly treats NVOCCs like competitors, rather than customers.

It is time for the Commission to use its expertise and discretion and eliminate the burden, expense and inefficiencies of NVOCC rate tariff publication.

Respectfully submitted,

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